No. 12,202

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS J. HUGHES,

Appellant,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

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In our opening brief we reviewed the evidence in detail, and, we think, thoroughly covered the law applicable to the facts in this case.

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hold that an insured who does such work is not totally and permanently disabled, we deem it proper to point out the inaccuracy of the defendant's statement of the evidence and the great difference between the activities of the various insureds in the cases so cited by the defendant, and what was done by the plaintiff.

Reference to defendant's brief will be indicated by "Br.", and the transcript of record as "T."

COMMENT ON DEFENDANT'S STATEMENT OF THE CASE.

The defendant states that according to the plaintiff's physician, the plaintiff was an active man, mentally alert and organically sound (Br. 3). This is an inaccurate statement, for the reason that the testimony of plaintiff's attending physician as a whole shows the plaintiff to be disabled from doing any work. The word "active" is a vague term. If a man is not absolutely helpless in bed, but is able to feed and clothe himself, he can be said to be active, although he cannot do any work. The doctor's testimony was that the plaintiff was so disabled that he could not work and that any attempt to do so was highly injurious. No claim was made during the trial or at any time that the defendant was not sound mentally.

Opposing counsel assert that the plaintiff did various things in connection with his farm and kept his land under cultivation (Br. 3), but they overlook the fact that all this was done by a foreman or farm manager and other workers. The plaintiff, before becoming disabled, supervised the operation of his farm

and dairy and did all kinds of farm work himself with the aid of one hired man (T 109), but after becoming disabled he had to abandon all this to a foreman and others. The plaintiff had no foreman before becoming disabled.

The defendant endeavors to make capital of the fact that the plaintiff had quite a gross income and kept his own books (Br. 4). This fact does not negative total and permanent disability when an insured is so disabled that he cannot perform the substantial and material acts of an occupation. Numerous cases cited in our opening brief uphold this contention, and, in *Erreca* v. *Western States Life Ins. Co.*, 19 Cal. (2d) 388, 121 P (2d) 689, the Supreme Court of California, after stating that the magnitude of the insured's enterprise and his income therefrom were not to be considered in determining whether or not the insured was totally disabled from performing remunerative work, went on to say, with reference to keeping books of farming operations, as follows:

> ". . . Secretarial work in connection with farm operations is unimportant." (Last sentence, paragraph numbered 7, page 695, 121 P (2d).

Comment is made upon the fact that plaintiff acted as administrator of an estate (Br. 4). This matter was covered in our opening brief, but the evidence in this respect is that the attorneys did all the work (T. 208).

Defendant seeks to give great importance to the fact that plaintiff was a member of a rural school board and a member of a water users counsel (Br. 4). These positions were honorary. No compensation was received for being on the school board which met most of the time at plaintiff's home because of his crippled up condition. The water users council met regularly four times a year to pass an occasional by-law. Compensation was $4.10 per meeting. The council is the law making body and did not have much activity (T. 198). The Board of Governors of the water users association, of which plaintiff was not a member, is the board that administers and runs the association (T. 198).

Plaintiff's trip to Washington, D. C., as pointed out in our opening brief, so adversely affected him that he had to stop in Kansas City where he was very ill and confined to his bed. He did not even leave his compartment while enroute (T. 205-206).

SUBDIVISION 1 OF DEFENDANT'S ARGUMENT DISCUSSED.

Defendant states that inasmuch as there is no ambiguity in the policy in question, there is no need for construction (Br. 6). The fact remains, however, that the courts have construed the words "totally and permanently disabled" as used in an insurance policy not to mean, as their literal construction would require, a state of absolute helplessness, but to mean inability to perform the substantial and material acts

of an occupation or perform them in the usual and customary manner. Accordingly, there is room for construction. Where words of a contract must be construed, it is the universal rule of law that the words are to be construed most strongly against the one who drew the contract.

Prudential Insurance Co. of America v. *Wolfe*, cited by defendant (Br. 6) is not in point. This was a suit on a group policy that had lapsed sometime before. The undisputed facts were that during the interim the insured was able to and did engage in several occupations for a considerable period of time after ceasing to work in the group covered by the policy.

In *Aronson* v. *Mutual Life Ins. Co. of New York*, next cited by defendant (Br. 7, 11, 17), the insured had some arthritis and claimed to be disabled, but the undisputed facts showed that the insured was a successful manager of an apartment hotel, that he did a great amount of work, took out a janitor's union card under an assumed name, had his daily routine about his work, and was able to perform it.

In the Washington case of *Cleveland* v. *Sun Life Insurance Co. of Canada* (Br. 7, 11, 17), the facts are that the insured broker after his claimed disability was able to carry on his business about as well as before. In two and a half months he made an eleven thousand mile automobile trip visiting the various

national parks and other places. He drove a considerable distance each day. He also went hunting, fishing, played golf and went to dances. The evidence in the case at bar shows that Mr. Hughes could not do any of these things. In this Washington case the insured's doctor testified that while insured had hypertropic arthritis of the spine, the condition of the insured was prevalent in seventy-five to ninety percent of men fifty years of age, that the condition had no clinical significance and that only about one percent of persons in the insured's condition have pain. The doctor further testified in that case that in his opinion the insured was not incapacitated from carrying on his duties with a degree of success and was not disabled with any degree from earning wages or profits in some occupation or gainful pursuit. Furthermore, the plaintiff's position in this Washington case has an unsavory odor. At the close of the plaintiff's case, after the doctor had so testified and it was apparent that the plaintiff would lose his case, his counsel prevailed upon the court to permit him to re-open the case. Thereupon, the doctor, who was in the court room and heard the discussion, again took the witness stand and testified that in his opinion the insured was totally and permanently disabled.

The foregoing cases are not in point, for the reason that although the insured claimed to be disabled, the admitted facts and other undisputed evidence disclosed otherwise.

DEFENDANT'S SUBDIVISION NO. 2 DISCUSSED.

Opposing counsel seek to criticize plaintiff because, although he cited sixty-nine cases he quoted from only nine (Br. 7). Space would not permit us to quote from all. We quoted from some to illustrate certain points. At the beginning of each subdivision of our brief, where cases were cited, we gave the holdings of the decisions there cited, under the belief that we had a right to assume that the court would want to consult the cases rather than rely on excerpts from them.

Defendant attempts to distinguish the cases involving farmers, cited in our opening brief, from the case at bar by saying that in those cases each farmer was found to be wholly unable to manage his farm and was also found to have abandoned management to others (Br. 8, 9). This is the situation in the case at bar, as the evidence clearly establishes that the plaintiff was so crippled up that he could only take short walks, could not go out into his fields or supervise the operation of his farm, but had to abandon management thereof to a foreman and the farm work to others.

SUBDIVISION NO. 3 OF DEFENDANT'S BRIEF DISCUSSED.

Defendant relies greatly on *Ireland* v. *Mutual Life Insurance Co. of New York* (Br. 10, 17, 24). The insured in this case followed his occupation after the claimed disability about the same as he had before. The insured in this case stated:

> "My principal duties were to provide funds for the operation of the farm." (page 208, second column, 38 S.E. (2d).

After suffering a disability the insured continued to provide these funds in the same manner as before. In addition thereto he continuously drove his automobile and his truck in making numerous trips to another town for the purpose of himself marketing and selling livestock, eggs, tobacco, cotton and other farm products, and in attending sales at stock yards and the tobacco market. He drove his automobile as much as twelve hundred miles in thirty days. He was successfully carrying on an occupation. Opposing counsel in their discussion of the case disclose only a small part of the activities of the insured.

This Ireland case is from North Carolina. We pointed out in our opening brief that the literal or strict construction rule of interpretation of the words "totally and permanently disabled" is no longer sound law. North Carolina is one of the states which has adhered to this literal or strict construction rule. The North Carolina Supreme Court, in *Bullock* v. *Mutual*

Life Insurance Co. of New York, 200 N.C. 642, 158 S.E. 185, said (1st column, page 187 S.E.):

> "North Carolina has been classified in the decisions of the various courts as adhering to the strict construction of such contracts." (insurance contracts)

Even this state has held an insured to be totally and permanently disabled when disabled to about the same extent as the plaintiff in the case at bar, as shown by some citations from that state in our opening brief.

Light v. *Conn. General Life Insurance Co.* (Br. 11, 27) is not in point, as the plaintiff in that case was insured under a group policy against disability in the particular occupation of oil field worker. Upon ceasing to work for the oil company his policy was terminated and after successfully farming for some time he attempted to claim that he had therefore become disabled while in the employ of the oil company.

In *Metropolitan Life Insurance Co.* v. *Alston* (Br. 12, 17) the insured after becoming afflicted with a heart ailment turned over management of his realty interests to a son, but continued to act as chairman of the board and chief executive officer of a bank, and, as stated by the court, he performed his responsible duties in the usual and customary way and received a salary of $700.00 per month. He had even been promoted and his salary increased. The gist of the court's

ruling is that if an insured is engaged in several occupations and gives up one because of a disability, but is able to carry on another one of them in a customary and efficient manner, he is not totally disabled.

In *Thigpen* v. *Jefferson Life Insurance Co.* (Br. 12, 17) the insured was able to follow an occupation though not his usual one. The first headnote to this case reads:

> "Insured was not wholly disabled within his disability clause of his life insurance policy unless he was prevented from pursuing any occupation for remuneration and profit and not merely the duties of his usual occupation."

This Thigpen case is also from the strict construction state of North Carolina.

Many courts hold an insured to be totally and permanently disabled if he is unable to perform the duties of his particular occupation, even though he is able to perform the substantial and material acts of some other business or occupation. These cases are annotated in paragraph III, c.l., 149 ALR 40. Also see *Equitable Life Assurance Society* v. *Bomar,* (CCA 6th) 106 F (2d) 640, and *Deckert* v. *Western & Southern L. Ins. Co.,* 51 F. Sup. 44.

In *Cobb* v. *Mutual Life Insurance Co. of New York* (Br. 13, 17) the insured operated his farm with a foreman prior to his claimed disability. A part of the insured's business was racing horses. After the claimed

disability his farm was run in the same manner as before, and the insured continued to attend races and race his horses over a wide territory, driving his automobile for that purpose. His own testimony disclosed that he did perform and had the ability to perform an essential part of his duties.

In *New York Life Ins. Co.* v. *Howard* (Br. 13, 17) the insured carried on many activities. The court in its opinion said that it did not appear from the evidence in sufficient detail what insured did before becoming disabled. The court further said not only did insured not desist from attending to his farm operations or performing certain duties with reference to his other businesses, but he undertook other duties, service in the General Assembly. The court's decision was not unanimous. The dissenting opinion states that the jury was authorized to find plaintiff totally and permanently disabled.

Azevedo v. *Mutual Life Insurance Co. of New York* (Br. 14) is another case where the evidence showed that while the action of plaintiff's right arm was impaired, he did perform substantial and material acts of his occupation of farming.

These cases cited by defendant illustrate the point that even though an insured claims to be disabled if the admitted facts and other undisputed evidence discloses that he works and is able to work, the court is justified in holding the insured not to be totally and

permanently disabled. The undisputed evidence in the case at bar is that the plaintiff does not work and is not able to work, but merely performs a few trivial tasks such as writing checks.

DEFENDANT'S SUBDIVISION NO. 4 DISCUSSED.

Defendant claims that what it terms the "common care and prudence doctrine" is not applicable in this case. The undisputed evidence of the plaintiff, his lay witnesses and his doctor, however, is that the plaintiff not only was compelled to desist from working, but even when he attempted to work or drive a tractor, such activities inflamed his joints, caused him to become ill, sick at the stomach and caused him to have to take treatments and go to bed. Dr. J. H. Patterson testified that endeavoring to work irritated the plaintiff's condition, brought on inflamation and was very harmful to him. All this evidence is reviewed in our opening brief.

Defendant's comment on the testimony of Dr. Goss to the effect that hypertropic arthritis is a common condition in men past fifty years of age, many of whom continue to work (Br. 16) does not give a fair picture of the doctor's testimony. What the doctor said was (T. 80):

> "A. They have some form of arthritis. Hypertropic form may not eventuate until later on, but usually men around fifty on up have some form of arthritis."

This doctor, however, further testified: (82)

> "Q. Dr. Goss, counsel brought from you that a man past fifty years at times had some arthritis. Is it normal or ordinary for them to have any such arthritis as manifested in these pictures? (of the plaintiff)
>
> "A. I would think not so to such extent as shown here."

Dr. Patterson testified that Mr. Hughes' condition was not normal for a man of his age (87).

Defendant advances the theory that the opinion evidence of a physician to the effect that the insured is totally and permanently disabled is without value when the undisputed evidence shows that the insured is actually pursuing an occupation with reasonable regularity (Br. 17). Any cases so holding are not applicable here, as the undisputed testimony of plaintiff's numerous witnesses other than doctors conclusively discloses that the plaintiff ceased to work in 1935 and has been unable to work since then, and is very badly crippled up.

The defendant seeks to distinguish cases involving persons afflicted with tuberculosis from the case at bar, on the ground that such a disease, as a matter of common knowledge, is seriously aggravated by activity (Br. 15). The evidence in the case at bar discloses that the plaintiff's arthritis is of such a severe nature that activity aggravates his disease and is harmful to him.

Defendant quotes at length from a South Carolina case (Br. 18). The citation is given but the case is not named. It is *Stewart* v. *Pyramid Life Ins. Co.* This case points out that the only evidence upon which the plaintiff could rely to take the case to the jury was the assertion of the doctor of his opinion that the plaintiff was totally and permanently disabled. The undisputed facts in the case were that the plaintiff was able to work and did continue his work. The court said that in the light of the undisputed facts, the testimony of the doctor had no probative value. In the case at bar, however, there is evidence of many witnesses that the plaintiff did not work and could not work.

In *Deadrich* v. *U. S.* (Br. 17, 27, 28) the court held that the insured could not recover on the theory that he was totally and permanently disabled at the time of the termination of his policy eleven years before when the admitted facts showed that during the interim the insured was able to follow and did follow several remunerative occupations. The medical testimony in this case was contrary to the admitted facts. To the same effect is *U. S.* v. *Baker* (Br. 17).

DEFENDANT'S SUBDIVISION NO. 5 DISCUSSED.

We feel that the capital investment phase of the case was so fully covered in our opening brief that it is unnecessary to reply to the defendant's comment on it. The Errica case and *Hoover* v. *Mutual Trust Life Ins. Co.*, 225 Iowa 1034, 282 NW 781 also well answer the defendant's argument.

The balance of defendant's brief, which is devoted to a discussion of the plaintiff's activities contains many inaccuracies and greatly magnifies these activities. Defendant infers that plaintiff is running the Salt River Valley Water Users Association, when in fact he is only a member of the council, the function of which is to meet only four times a year to occasionally pass some by-law. The assertion is made that the plaintiff on a few occasions drove a tractor when the evidence discloses that when he attempted to drive one it made him sick. The incident about the tractor in 1948 referred to on page 25 of the brief is the attempt to run one that Roy Painter testified made the defendant ill and he had to go to the house and lie down (T. 215). On the same page, the defendant states that the plaintiff purchased livestock. There is no evidence of any purchase. Plaintiff's herd did increase because it so happens that cows have calves. On cross-examination this testimony was given by plaintiff with reference to his activities with cattle (T. 133):

> Q. Does Manuel Viermontes (the foreman) look after those cows?
>
> A. He looks after the whole ranch, everything."

Defendant attempts to infer that plaintiff as a member of a water users council inspected dams. The evidence is that the council made yearly inspection trips to the dams in buses. The plaintiff had not made any trips for quite a while and when he did make the

trips he was unable to walk around or inspect the dams (T. 193, 204). Defendant states that plaintiff on behalf of a non-resident sister participated in the acquisition and operation of a farm (Br. 20) and that the plaintiff handled a forty acre farm for the sister (Br. 22). This is another exaggeration as the plaintiff did not either acquire or operate the farm. All the plaintiff did was call a man and tell him his sister wanted her land plowed up and then told his foreman to plant grain for his sister, get it ready, have it harvested and deliver it to the mill (T. 143-144). This could have been done by a bedridden invalid.

Defendant on page 23 of its brief quotes a part of a paragraph taken from page 31 of our opening brief, and claims that it is an adverse admission of the plaintiff. The quotation referred to is our recital of what the court said the facts were in the case of *Mutual Life Ins. Company of New York* v. *Dowdle* and has nothing to do with the plaintiff's activities in this case.

Defendant's comment on what is shown by the evidence contains many other distortions, inaccuracies and exaggerations, but space will not permit us to point out all of them. In speaking of the plaintiff's farming operations the defendant assumes that the plaintiff himself has been carrying on these operations when in fact he has not, but has had to abandon them to a foreman.

Defendant is critical because suit was not brought for nearly six years after the first default (Br. 27). Upon the company's default the plaintiff consulted counsel (T. 53). Plaintiff, a man of some means, did not require the benefit payments for his immediate needs. This type of litigation is expensive and especially so where medical testimony is required. An action soon after default would not have determined plaintiff's future disability or rights. Successive suits would have to be brought. Advising plaintiff to wait until the amount involved was worth a law suit was reasonable advice. Arizona has a six year statute of limitations on written contracts (Section 29-205 Arizona Code 1939). During the period in question, defendant was informed that its position would be contested by the letters of protest accompanying premium payments (T. 65-66, 101).

COMMENT ON DEFENDANT'S CONCLUSION.

In conclusion counsel for defendant make the statement that no evidence nor medical opinion whatsoever was introduced or even offered to show or tending to show that plaintiff was totally and permanently disabled on February 1, 1942 (Br. 27). This statement is another highly inaccurate one.

The plaintiff's lay witnesses testified that ever since about the year 1935 plaintiff had not worked, had been crippled up and unable to work (T. 212-220, 223-227, 220-222, 230-235, 236-238, 227-230).

Furthermore, X-rays taken in 1935, 1938 and 1948 were introduced in evidence which show the severity of the plaintiff's arthritic and crippled up condition ever since the year 1935. The testimony of Dr. J. H. Patterson (T. 82-101) who had been plaintiff's attending physician ever since 1935 is that the plaintiff was badly crippled up in the year 1935 and unable to work ever since that time, and that his condition had gotten progressively worse up to the time of the trial (T. 87, 91, 94).

The undisputed evidence is that the plaintiff in the year 1935 made satisfactory proof of his total and permanent disability; that the company thereupon commenced awarding him the benefits provided in his policy and that the plaintiff ever since 1935 has gotten progressively worse.

A fair picture to be drawn from the evidence as a whole is that prior to becoming disabled in 1935 the plaintiff was a very active man who not only supervised and managed his farming interests, but did all kinds of farm labor himself; that since becoming disabled he has had to turn over the supervision and management to a foreman and the farm work to others; that prior to becoming disabled the plaintiff was a hard working man; that he is an ambitious man who hates to give up and be absolutely helpless, and that accordingly he keeps as active as possible and clings to his honorary positions on the council of the water users association and school board which requires almost no effort. On the school board there is

not much for Mr. Hughes to do, although he is consulted on matters of policy (T. 229). The school has a bookkeeper who, together with the principal, make up the budget. The principal hires the teachers (T. 228).

The plaintiff as shown by the undisputed evidence is unable to do any work at all other than perform a few trivial tasks, is unable to perform the substantial and material acts of any occupation, or perform them in the usual or customary manner, and is unable to work with reasonable continuity at any gainful employment at all.

Respectfully submitted,

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